No. 7889

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
KATIE M. EUSTACE, etc.,
Alleged Bankrupt.

Katie M. Eustace and Chas. W. Fourl,
Appellants,
vs.
E. A. Lynch, etc.,
Appellee.

BRIEF OF APPELLANT KATIE M. EUSTACE.

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STATEMENT OF FACTS.

This is an appeal from a judgment entered in the District Court of the United States for the Southern District of California, Central Division, by the Honorable Judge Cosgrave, in proceedings instituted within and *entirely conducted within* the above entitled bankruptcy matter, adjudging appellant to be in contempt of court [p. 128] and sentencing appellant to pay unto the UNITED STATES OF AMERICA a fine in the sum of one thousand dollars ($1000) and stand committed to custody until said fine shall have been paid [p. 137].

The following facts appear from the record:

On August 24, 1934, one A. M. Kupfer, a partner of Katie M. Eustace in an oil well venture, having a judgment of $49.95 [p. 7] against said Katie M. Eustace, joined with two other alleged creditors of said Katie M. Eustace on claims relating to the oil well and filed an involuntary petition in bankruptcy against Katie M. Eustace, alleged to be doing business as the Eustace Plumbing Company [Tr. p. 6].

It was stipulated on the hearing that none of said petitioning creditors were creditors of the Eustace Plumbing Company and that their claims had nothing to do with said Eustace Plumbing Company [p. 112] but "related to an oil well in which Mrs. Eustace and Mr. Kupfer were partners" [p. 108].

The involuntary petition is fatally defective in its jurisdictional facts but nevertheless this same partner alone, on his $49.95 claim [p. 108] on Sept. 7, 1934, filed a petition for a receiver [p. 13] for the alleged bankrupt, alleged to be doing business as the Eustace Plumbing Company [p. 11] and upon such petition *ex parte* and without notice, an order appointing a receiver of Katie M. Eustace, doing business as the Eustace Plumbing Company, was made [p. 13].

The order was general in its nature, described no particular property [p. 13], and required the petitioning creditor to put up a bond of only $500. [p. 11].

For more than thirty years the husband of Katie M. Eustace had conducted a plumbing business at various places in Los Angeles, and at the time herein involved had two locations within said city—one at 1246 East Ninth street and one on La Brea avenue [p. 95]. Said

husband, John M. Eustace, had filed a certificate of fictitious name which was published as required by law [p. 92] showing that he was doing business at these two locations under the name and style of "Eustace Plumbing Company."

Immediately upon qualification said receiver proceeded to 1246 East Ninth street, Los Angeles, where the "Eustace Plumbing Company" was doing business, and found there no one but a man named Stevenson working on a grinding machine, reconditioning some second-hand machinery [p. 53]. The receiver talked to the workman for a while and in about an hour the alleged bankrupt, Katie M. Eustace, and Chas. W. Fourl, appellants herein, appeared at the said East Ninth Street shop of the "Eustace Plumbing Company" [p. 54]. The receiver testified he gave the alleged bankrupt a copy of his order of appointment and demanded possession [p. 54]. It is admitted by all parties that thereupon appellants herein informed said receiver that John M. Eustace, the husband of Katie M. Eustace, was the owner of said business and had been such for more than thirty years [pp. 54, 61, 99], and that he had filed a certificate of fictitious name in the county clerk's office, which he had published according to law [p. 94]. Said certificate was read to said receiver by one of his men from the La Brea Street shop [p. 70].

Before this time, when appellee was on his way to the shop at East Ninth street, to demand possession, the said receiver met one Hiram E. Casey, an attorney, whom said receiver knew represented Katie M. Eustace [p. 40] and feeling the information would afford Casey a "good laugh," the receiver informed him that he was about to "CRASH" Mrs. Eustace [p. 39] but did not inform him

that proceedings had been started or of said receiver's appointment [p. 40]. Said Casey thereupon told the said receiver that he should stay away from the store of the Eustace Plumbing Company, that Katie M. Eustace had no interest in the business of the Eustace Plumbing Company, and directed his attention to the fact that if he went to the public records he would find a certificate of fictitious name, duly signed and filed and published showing John M. Eustace, the husband, was the owner of said "Eustace Plumbing Company" [p. 40]. Said receiver was also informed by appellants when he was at said place of business that a large amount of the equipment at said shop was owned by appellant Fourl which he had bought for use in construction of a large refinery at Long Beach and which he was then building [p. 57]. Said Chas. W. Fourl is, and was at all times, the attorney of John M. Eustace, authorized to do any and all things for and on his behalf, and so informed said receiver Lynch [p. 56].

Both the receiver and appellants remained at the store all afternoon of the day the receiver sought to take possession, the appellant Fourl telling him said receiver was a trespasser and an interloper and had no business there [pp. 56, 99], and that an examination of the order to show cause he had did not disclose he was entitled to take possession of this business [p. 99] claimed by, in possession of and owned by John M. Eustace. The receiver's attention was directed to the fact that the order required third persons to deliver possession of property in their possession only when the property was held by such party as agent or servant of Katie M. Eustace, and was owned by said alleged bankrupt [p. 99]. Much conversation took

place, the receiver saying he was going to remain there, the appellants telling him he was a trespasser and would have to go at the close of business [pp. 56, 99].

At about 6 o'clock p. m. appellants told the receiver the store was going to be closed for the day and he would have to go. He said that he could not do this as he did not want to be subject to criticism and that said Fourl would have to put his hands on him and he would leave [p. 100]. No force or violence was used. The said Fourl thereupon put his arm around the receiver's waist, and the two then walked through the outer door together, after which the place was locked [p. 100]. As one party spontaneously stated this "looks like a spring dance" [p. 82].

The following morning, Sept. 11, 1934, appellee filed with the District Court a "Petition of Receiver for Order to Show Cause *in re* Contempt and Restoration of Possession" [pp. 16-19]. Thereupon the District Court issued its "Order to Show Cause" directed to both appellants requiring them—at 2 o'clock p. m. Sept. 12, 1934—to show cause "why an order should not be made declaring them in contempt for interfering with the possession of the receiver herein at the premises at 1246 East Ninth street, Los Angeles, California, and why an order should not be made restoring possession forthwith of said premises to your "receiver," etc. [p. 20].

Time for service of this order was shortened to one day [p. 20].

Service of this order was made on appellant a short time before the matter was called for hearing at 2 o'clock on Sept. 12 [p. 37]. No service had at that time been made on Chas. W. Fourl and he did not appear [p. 37].

Appellant was present with her attorney in response to the citation. Upon the call of the matter, her attorney requested from the court two or three days time within which to prepare, serve and file a motion directed to the petition, which request was denied by the court [p. 37]. Appellant's attorney then requested two or three days time within which to file an answer in writing, stating that the petition and order to show cause were a one-day petition and order and had just been served on appellant [p. 37]; this request was likewise denied [p. 37]. The record shows that counsel then noted an exception to both the refusal of the court of permission to file a motion and the refusal of the court to permit the filing of a written answer. As stated above, this was sometime after 2 p. m. [p. 37]. The court then took up other matters and returned to this matter about 3:15 p. m. the same afternoon.

When this matter was again called, appellant's attorney stated to the court that he had not had time for preparation of the said proceedings, and that he had not had time to prepare an answer. He suggested to the court that, inasmuch as the proceedings against Chas. W. Fourl were of a similar nature, it would seem advisable to continue the hearing against appellant and consolidate it with the other hearing. The court refused to accept the said suggestion and ordered the matter to proceed *forthwith* to trial as against appellant [p. 38]. Appellant's attorney then moved for a continuance on the ground that he had not had time or opportunity to subpoena or procure witnesses necessary and material for the defense of appellant, stating to the court the names of certain witnesses he desired to subpoena and have present [p. 38]. The court refused this request for continuance and ordered the trial

to proceed, to which ruling an exception was taken by appellant [p. 39]. Appellant's attorney then requested that a shorthand reporter or official court reporter be present to transcribe and preserve a record of the proceedings, but the court ordered the matter to proceed without a reporter, to which ruling a further exception was taken by appellant [p. 39].

Three witnesses were then examined, the receiver, one Stevenson, an employee of the Eustace Plumbing Company, and the alleged bankrupt. The receiver first took the stand and testified in detail as to his efforts to take over the place of business of the Eustace Plumbing Company on East Ninth street and the resistance he claimed to have encountered from appellant and her husband's attorney, Chas. W. Fourl [p. 39]. J. G. Stevenson, an employee of the Eustace Plumbing Company, was then called and testified [p. 40] as to a conversation with the receiver Lynch on the occasion when Lynch came there.

Appellant was next called as a witness by the receiver [p. 42]. As we have previously noted, she was denied an opportunity to prepare a motion directed to the petition filed by E. A. Lynch, which would have challenged the jurisdiction of the court to proceed in this summary manner. She was not allowed time to file an answer. She was not allowed to subpoena witnesses. She was not allowed to have a court reporter present, though her counsel prior to the commencement of the hearing had requested one. And she was placed on the stand as a witness for appellee without being informed as to the nature of the proceedings—whether civil or criminal—without being advised that the purpose of the proceeding was to punish her for a past act—without being advised of her constitutional right against self-incrimination. Had

the proceedings borne any indicia of criminal prosecution, appellant could not have been required to testify against herself, but she was called and examined exactly as any defendant in a civil proceeding might have been.

At 5:30 p. m. [Tr. p. 42] the court announced that it would be compelled to take an adjournment and that further proceedings in the pending matter against Katie M. Eustace would be suspended until the termination on the petition for contempt of the hearing against Charles W. Fourl. The court then adjourned [p. 44]. That was September 12, 1934.

As we shall contend, later in this brief, that any possible contempt committed by appellant was cured by her action in court at this hearing, we wish to here quote from the clerk's minutes of September 12th:

> "The receiver is instructed to take possession of the property, and the court having stated that if there is any interference with the receiver, the court will be inclined to be severe about it. Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court, and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared" [p. 22].

The next day, September 13, 1934, a formal order finding appellant guilty of contempt was signed by Judge Cosgrave [Tr. pp. 23-26] which also directed delivery of possession of the business to the receiver. This order was subsequently set aside on Sept. 22, 1934, and a formal order containing many findings of fact, was made *nunc*

pro tunc on Sept. 24, 1934 [Tr. pp. 129-133] and the court thereupon found Katie M. Eustice guilty of contempt [p. 45]. On Sept. 22, 1934, it was stipulated that, if the court would set aside the order of Sept. 13, 1934, appellant Eustace would stipulate that the evidence offered and received in the Fourl matter should be considered as having been offered and received in appellant Eustace's matter, with the understanding that said appellant should have all the benefits of all the objections made and exceptions taken by counsel for Mr. Fourl [pp. 44-45]. The court said that the matter had been determined but notwithstanding he would receive the stipulation [p. 45]. The matter was forthwith submitted for decision and the court found appellant guilty of contempt. Time for sentence was fixed for the following Monday [p. 45]. On Sept. 24, 1934, sentence in the matter at bar was continued to October 1, 1934, when the following minute order was entered:

> "It is the judgment of the court that Katie M. Eustace, heretofore adjudged in contempt, pay unto the United States of America a fine in the sum of one thousand dollars ($1000.00) and stand committed to the Orange county jail until fine is paid; and she is meanwhile remanded to custody; [Tr. p. 137].
>
> "A motion by H. E. Casey, Esq., for stay of execution is denied" [p. 137].

By stipulation, the appeal taken by appellant from the judgment against her and the appeal taken by Chas. W. Fourl from the judgment against him are both brought up

on one consolidated record [p. 121]. From this record it is obvious that at no state of the proceedings was the UNITED STATES OF AMERICA brought in as a party. At no time did the United States District Attorney attend or take part in them. Yet appellant was sentenced to pay unto the UNITED STATES OF AMERICA a fine in the sum of ONE THOUSAND DOLLARS and stand committed to jail *until this fine was paid.* NOT *until the further order of the court,* but until paid, and she was remanded to immediate custody, without stay.

We might well rest here without citation of authority as we feel that a mere statement of the foregoing facts would indicate a reversal. However, an examination of the authorities which follow leaves no room for any doubt on the subject.

Questions Presented.

The questions presented and which will be argued in this brief may be stated as follows:

(1) Is a contempt proceeding entitled in a bankruptcy cause, conducted by counsel for the petitioning creditors and not by the United States District Attorney and praying that appellant be held in contempt of court and requiring possession of certain premises be restored to *the receiver* and for an injunction, a criminal proceeding in which appellant can be fined and required to pay a fine to the United States of America? Was not the sentence imposed appropriate only to a criminal contempt?

(2) The appointment of a receiver *ex parte,* where the procedings are fatally defective, and where petition fails to state any jurisdictional facts warranting such relief, is void, and no contempt is committed by resisting his efforts to take possession of property under such void appointment.

(3) Did the order in this cause [p. 13] appointing the receiver and giving him his authority and authorizing said receiver to take possession of all property owned by or in possession of said alleged bankrupt authorize said receiver to take possession of the business of John M. Eustace, appellant's husband, and an adverse claimant?

(4) Was not the cause herein so conducted as to deprive appellant of her constitutional rights in violation to the due process clause of the United States Constitution?

(5) Were not errors of law made in such hearing in the admission and rejection of evidence of such character as to prejudice the appellant and prevent HER from having a full and fair trial on the merits?

(6) If appellant herein was guilty of contempt, was such contempt not purged by her subsequent conduct?

ASSIGNMENTS OF ERROR TO BE NOTED.

Assignments of error numbered I to XIX, with the exception of VIII will be hereafter noted and argued and will be quoted under appropriate points.

POINT I.

Observance of Procedural Distinction Between Civil and Criminal Contempt Is Jurisdictional.

The lower court had no jurisdiction to impose a fine payable to the United States and order appellant to stand committed to jail until the fine is paid, in a contempt proceeding entitled in a bankruptcy proceeding, the United States not being a party, and the cause not being prosecuted either by information or indictment, but being conducted entirely by counsel for the receiver for whose benefit the proceedings were prosecuted.

In connection with this point we note the assignments of error numbered II, III, IV, V, VI and VII [pp. 151-152], all of which, in varying language, present the point. For convenience they are repeated here:

(No. II.) The court erred in permitting the proceedings instituted and tried as civil proceedings to go to final judgment in criminal contempt.

(No. III.) The court erred in finding Kate M. Eustace guilty of criminal contempt on evidence produced in a civil proceeding.

(No. IV.) The court erred in finding Katie M. Eustace guilty of a criminal contempt without any charge of criminal contempt ever having been brought against him.

(No. V.) The court erred in exercising criminal jurisdiction in a civil proceeding in which no criminal jurisdiction exists.

(No. VI.) The court erred in finding Katie M. Eustace guilty of a criminal offense against the United States of America in an action in which the United States of America is not now, nor ever has been, a party.

(No. VII.) The court erred in refusing to dismiss the whole proceedings against Katie M. Eustace upon the conclusion of the entire case.

It is our contention that the authorities hereinafter cited clearly establish the principle that proceedings to punish for constructive contempt must be either civil or criminal; that if the object sought is coercion or an enforced compliance with the court's order theretofore made, the proceeding must be instituted and conducted as a civil proceeding and that the punishment imposed shall be only such as is appropriate thereto, to-wit, imprisonment until the order of the court is complied with; that if the object sought is punishment for a past act, as in vindication of the court's authority, then the proceeding must be instituted, entitled and tried as a criminal proceeding, that is to say, the United States of America must appear as the complainant, the proceding must be instituted by the District Attorney, and that when punishment is imposed in *such* proceeding, then and only then can sentence be to a definite and fixed term of imprisonment or a definite sum as a fine.

Both the petition for an order *in re* contempt and restoration of possession [pp. 16-19] and the order to show cause *in re* contempt, issued thereon [p. 20] seek

three things: First, an adjudication of contempt against appellants; second, an order restoring possession of certain premises forthwith to the receiver; third, a restraining order against future interference with said premises, all of which are civil matters.

At the conclusion of the hearing as to the appellant, Katie M. Eustace, the court found her guilty of contempt verbally and on the same day entered a written order thereon [p. 23] finding her guilty of contempt and granting all civil relief prayed for in the order to show cause, which order of September 13, 1934, was later set aside as to appellant Katie M. Eustace and a new order *in re* contempt made, dated Sept. 25, 1934 [pp. 129-133], which confirmed all civil relief theretofore granted by the previous order. This order of Sept. 25, 1934, was directed to be entered *nunc pro tunc* as of Sept. 22, 1934 [p. 133].

This order which was in the nature of findings of fact and conclusions of law has no place in a criminal proceeding and could only be appropriate to a civil proceeding.

Indeed, the court's idea as to the character and nature of the proceedings is best indicated by the statement he made with respect to an objection to the admissibility of certain hearsay statements offered by the receiver. The court said:

> "No, that would be true in a case on trial but this is an *informal* hearing, understand. The court makes up his mind here from all the facts and circumstances produced" [p. 86].

The order to show cause, as pointed out, was made on Sept. 11, 1934, and returnable Sept. 12, 1934. What opportunity could one have for preparing one's case; sum-

mon witnesses, prepare pleadings for a criminal case? It was obviously originally intended by the attorneys as a turnover order. Appellant Eustace was caused to go to trial on the case on the day following the order to show cause, the court refusing her attorney a continuance to summon witnesses [p. 38] or time to prepare written pleadings [p. 38] and forced her to trial at once [p. 39] and also refused her a. reporter [p. 39].

The foregoing gives this court somewhat of an idea as to the conduct of the proceedings as they were had in the lower court. The pleadings and orders in the case all show they were only in a civil cause.

Every paper and proceeding in this cause was entitled in, initiated in and prosecuted in the said bankruptcy proceeding, even including the sentence [p. 137]. The petition for an order to show cause *in re* contempt and restoration of possession [p. 16] was entitled in the bankruptcy matter of Katie M. Eustace, alleged bankrupt [p. 16] and was on behalf of E. A. Lynch, receiver in bankruptcy [p. 16], signed by E. A. Lynch [p. 16] and prayed for an order to show cause why Katie M. Eustace and Chas. W. Fourl should not be held in contempt of court for interfering with the possession of the receiver of certain premises and why possession of said premises should not be restored forthwith to such receiver [p. 16]. The order to show cause [p. 20] *in re* contempt recites it is upon petition of the receiver and follows the prayer of the petition seeking a declaration of contempt against Katie M. Eustace and Chas. W. Fourl and *restoration to the receiver of possession of said premises* [p. 20]. The receiver was represented by the attorney for the alleged creditor on the hearing [pp. 21, 22, 23; pp. 133-137; pp.

129-133] and the orders [p. 23, pp. 134-37] finding appellants guilty of contempt all are entitled in the bankruptcy proceeding and show such attorney and the receiver were the moving parties at all times. Nowhere does it appear the United States of America has any part in the proceedings. Neither the petition *in re* contempt, the order to show cause *in re* contempt [p. 20] nor any other paper in the cause indicate that it is sought to punish appellants by fine or otherwise for a criminal act.

The court at the conclusion of the "INFORMAL HEARING" found the appellants *guilty* of contempt and continued *sentence* to a certain date [p. 128]. When the time arrived for sentence of appellants the court treated the case as a criminal one, and sentenced appellant Chas. W. Fourl [pp. 134-135] to pay a fine of $1000 to the United States of America, and the same sentence was given to appellant Katie M. Eustace [p. 137]. No showing of damages or injury to anyone, such as would have been necessary had the proceeding been deemed a civil one, was either pleaded or proved.

A civil proceeding, initiated as such, conducted informally [p. 86] was thus at time of judgment and sentence treated as a criminal matter. This is such a variance between the procedure adopted, the conduct of the proceedings and the punishment imposed as to be a deprivation of substantial rights of the appellants. The leading case on this subject is *Gompers v. Bucks Stove, etc. Co.,* 221 U. S. 418, 444, wherein the court imposed imprisonment for contempt of court in violating an injunction in a civil suit but gave nothing to the Bucks Stove Company; the court said:

"If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or by appeal. Bessette v. Conkey, 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. Boyd v. U. S., 116 U. S. 616; United States v. Jose, 63 Fed. Rep. 951; State v. Davis, 50 W. Va. 100; King v. Ohio Ry., 7 Biss. 529; Sabin v. Fogarty, 70 Fed. Rep. 482, 483; Drekeford v. Adams, 98 Georgia 724.

There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main case. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The Court of Appeals recognizing this difference held that this was not a part of the equity cause of the Bucks Stove & Range Company v. the American Federation of Labor *et al.*, and said that 'The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceedings. It was in a separate action, one personal to the defend-

ants, with the defendants on one side and the court vindicating its authority on the other.'

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the Court, or more properly, with the Government, on one side and the defendant on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original case in equity. The Bucks Stove & Range Company was not only a nominal, but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting the case for criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the Court of Appeals distinctly held that this was not a part of the equity cause it will be proper to set out in some detail the facts on this subject as they appear in the record.

In the first place the petition was not entitled 'United States v. Samuel Gompers *et al.*' or *In re* Samuel Gompers *et al.*' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought

to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charges against him, but to know that it is a charge and not a suit. U. S. v. Cruikshank, 92 U. S. 542, 559."

The same rule was applied in *In re Kahn,* 204 Fed. 581, 582. The court said:

"Applying then the principles of the Gompers Case it is evident that when it appears that a sentence to a fixed and absolute term of imprisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. Such a punishment was imposed in this case. Nothing the defendant could have done would have prevented his imprisonment for the full term of ten days. That part of the punishment was to vindicate the authority of the court. The coercive part—the part to aid the complainant—did not become operative until after the punitive part had been complied with. The latter must be supported, if at all, by establishing that it was made in a criminal proceeding.

Were the proceedings criminal in their nature? The most important question bearing upon this as to whether they were between the public and the defendant. They were not. The government did not prosecute nor did anyone claim to act in its behalf. The complainant was the attorney for the receiver in bankruptcy and the contempt proceeding was really in favor of the latter. The petition was not entitled as in a criminal case. The order bore the title of

the main bankruptcy proceedings. The prayer for relief was for an adjudication in contempt and for further relief of the petitioner. All the indicia of the civil cause incidental to the proceedings in bankruptcy, and none whatever of a criminal case, were present. The situation was precisely that stated in the Gompers Case:

'A variance between the procedure adopted and punishment imposed, when in answer to a prayer for relief in the * * * (civil) cause the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt.' "

The decision of the Supreme Court of the United States in the *Gompers* case was held to be directly applicable to contempt cases arising in the bankruptcy courts by the 8th Circuit Court of Appeals in its decision of the case of *Wakefield v. Housel,* 288 Fed. 712, where the proceedings were instituted, entitled and tried as part of a bankruptcy matter, by counsel for the creditors.

In this case just mentioned the opinion of the Eighth Circuit drawns an analogy between the facts of the case there and the facts of the *Gompers* case. In the following quotation from that case we have drawn the analogy further to show that both decisions are clearly controlling in the case at bar:

"The question recurs: Was the proceeding which has been described, and upon which this judgment of criminal contempt is based, 'instituted and tried as for criminal contempt?' The Supreme Court noticed and specified these indications that the contempt proceeding in the Gompers case was not so instituted and tried: (1) That there was nothing in the record indicating that the court or the government was on one

side of the contempt proceedings and the defendants on the other. There is nothing in the case at hand so indicating." (*Nor is there anything in the record of the case at bar to so indicate.*) "(2) That the contempt proceedings were instituted, entitled and tried as a part of the original suit in equity. So was the contempt proceeding here. The referee's certificate of contempt, the petition to the District Court for the order to show cause, and the order of the court adjudging Wakefield in contempt were entitled: 'In the Matter of Butler-Williams-Wakefield Motor Company, a Copartnership Composed of E. M. Butler, R. L. Williams and S. L. Wakefield, and E. M. Butler, R. L. Williams and S. L. Wakefield, Individuals, Bankrubts. In Bankruptcy No. 1712.'" (*In the case at bar, the "Petition of Receiver for an Order to Show Cause in re Contempt and Restoration of Possession," the order to show cause, and the order of the Court adjudging appellant guilty of contempt were each entitled: "In the matter of Katie M. Eustace, etc., Alleged Bankrupt."*) "(3) That the Bucks Stove & Range Company, through its counsel, conducted the proceeding for the adjudication of contempt, not as a representative of the United States or of the Court, but for itself, and its counsel, in its name, filed briefs and made arguments for affirmance of the judgment in the appellate court. This is equally true of the trustee in bankruptcy and his counsel in this contempt proceeding against Wakefield."

And we may add, *it is equally true in this contempt proceeding.* This striking analogy between these cases should leave no doubt in the minds of this court as to the fatally defective character of the proceedings below. Additional definitions of and the distinctions between civil contempt and criminal contempt may be found in *In re*

Nevitt, 117 Fed. 448, 458, 54 C. C. A. 622, and *Bessett v. W. B. Conkey Co.,* 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. ed. 997.

In a very recent case decided January 21, 1935, *In re Guzzardi,* 28 Am. B. R. (N. S.) 130, the Second Circuit Court of Appeals has reaffirmed its earlier decision of *In re Kahn,* 204 Fed. 481, and because of being so recent and its statement of principles involved we quote therefrom at length.

The court said (28 Am. B. Rep. (N. S.) 130:

> "The bankrupt appeals from an order of the bankruptcy court sentencing him to 60 days' imprisonment for contempt of court. The proceeding was commenced by an order to show cause, supported by the petition of the trustee in bankruptcy, both entitled in the bankruptcy proceeding. The order required the bankrupt to 'show cause why he should not be punished for contempt of court for interfering with the orders of this court and with the administration of the estate . . . and in concealing and inducing disobedience of the witnesses to the orders of this court and why he should not be directed to produce for examination . . . Josephine Quartucci, Caroline Quartucci and John Quartucci.' The petition stated its purpose in substantially similar form, speaking, however, of the production of the witnesses as 'additional or alternative relief.' It concluded with a prayer 'that the bankrupt should be punished for contempt of court and should be directed to produce his relatives as witnesses and that he be stayed and enjoined from interfering with the processes of this court and from harboring these witnesses.' The bankrupt filed an affidavit containing

argumentative denials of the petition, and the case went to trial before the judge. . . . The most important question is whether the proceeding was obviously criminal from the outset, or from a time early enough to advise him and protect his rights. To prove that it was, the trustee relied especially upon the process and the petition which asked that he be 'punished' for having interfered with the processes of the court, and upon the repeated declarations of the judge during the hearings that the proceeding was to 'punish' him for contempt. Again, he relied upon the reply to the court, after sentence, of the attorney for Caroline Quartucci acting apparently for the bankrupt, at the moment that he had assumed from the way the proceeding was going, that he would be imprisoned.

The great importance attached to the characterization as criminal of a proceeding to punish for contempt, dates from Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, before which the practice had been looser. The Supreme Court there set out the elements which persuaded it that that proceding had been civil. We read the opinion, not as making crucial any one detail, but rather as summing up the features of a portrait which as a whole was plainly recognizable. If so, our duty here is to learn how far the case at bar may be superimposed upon the facts there. That proceeding was prosecuted by the party aggrieved; it was apparently a part of the civil proceedings in chief, being so entitled; the plaintiff asked costs, and called the respondents to the stand; there was a clause in the prayer asking general relief. The facts here are parallel except that the trustee did not call the bankrupt to the stand and asked no costs.

Nevertheless the character of the charge at bar was as equivocal as there; to demand that the respondent should be 'punished' did not tell him that he stood in jeopardy of an unconditional imprisonment. 'Punishment' is a word apt for civil contempts and constantly so used. Thus, if a man be imprisoned for violation of a decree till he complies with it, he would regard himself as 'punished' thought he could get out when he chose. Again, he would think that he was 'punished' if he were fined the expenses of a civil proceeding, as he might be. It does not distort the language of process to say that the trustee might have meant only to put pressure upon the respondent to produce the witnesses named, by locking him up until he did produce them and fining him for the expenses after he had. Again, some part of the relief asked was civil in any event, and the proceeding bore every evidence of being part of the bankruptcy proceedings. Finally, it was prosecuted by the trustee without the initiative of judge or district attorney. In our opinion its criminal aspect was for these reasons not marked clearly enough to support an unconditional sentence of imprisonment. Bradstreet Co. v. Bradstreet's Collection Bureau (C. C. A., 2d Cir.), 249 F. 958; Shulman v. United States (C. C. A., 6th Cir.), 9 Am. B. R. (N. S.) 836, 18 F. (2d) 579; Monroe Body Co. v. Herzog (C. C. A., 6th Cir.), 18 F. (2d) 578; Wakefield v. Housel (C. C. A., 8th Cir.), 1 Am. B. R. (N. S.) 664, 288 F. 712; Mitchell v. Dexter (C. C. A., 1st Cir.), 244 F. 926.

We have ourselves gone further and flatly decided that unless the charge be prosecuted by the district attorney, it cannot be considered as criminal at all. *In re* Kahn (C. C. A., 2d Cir.), 30 Am. B. R. 322, 204 F. 581. That would be conclusive upon us now,

were it not, that in three other circuits it seems to have been assumed that this was not a *sine qua non,* though there was little or nothing said about it in the opinions. Kreplik v. Couch Patents Co. (C. C. A., 1st Cir.), 190 F. 565; *In re* Star Spring Bed Co. (C. C. A., 3d Cir.), 30 Am. B. R. 208, 203 F. 640; *In re* Kaplan Bros. (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 F. 753; Wingert v. Kieffer (C. C. A., 4th Cir.), 12 Am. B. R. (N. S.) 648, 29 F. (2d) 59. Cf. Monroe Body Co. v. Herzog, *supra.* In spite of these decisions there can, however, be no doubt that prosecution by the judge *sua sponte,* or by the district attorney, is an important factor in deciding the issue. In the case at bar it was especially important. An assistant district attorney was present during the hearings, or at least for a part of them, observing, but taking no part. Apparently he wished to keep aloof and merely to learn whether anything would transpire to show that a crime had been committed. His presence without participation was surely misleading if a criminal prosecution was in progress; and while the district attorney did indeed seek to intervene upon this appeal, it was then too late. So far as the doctrine is serviceable at all, it can only be to advise the accused of the nature of the claim; and it serves him not at all after the event.

It is perhaps a misfortune that the result should depend upon the form of the proceeding, and it is quite likely that in fact the bankrupt knew what the consequences to him might be, quite as well as though he had been expressly so told. But whatever the value of the distinction, we must assume that Gompers v. Bucks Stove Co., *supra,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 787, 34 L. R. A. (N. S.) 874, is still

> the law, and we must give it its proper effect, so far as we can see. Besides, it is of at least some practical consequence to the respondent in such a proceeding to know whether he is charged with crime; the outcome may be severer, and the degree of proof is higher; his conduct may be governed accordingly. We do not say that this must be known at the outset; it is enough if it becomes manifest in season; but manifest it must be, and not for the first time on appeal. Nor does the requirement involve any hardship to the party who promotes the cause, unless he is really bent upon prosecuting and controlling a criminal proceeding as his own. There is no reason why its character should not be expressly declared at the outset and the initiative of the judge secured, or that of the district attorney. If counsel see fit to leave this feature of the cause *in nubibus* they have themselves to thank for the eventual miscarriage. We will not go through a record, catching at straws, which lead us first one way and then another, and in the end force us to guess about a matter which could be so easily set right at the beginning."

While in the *Guzzardi* case the prayer of the order and petition indicated that the defendants were to be punished, no such prayer occurred here (pp. 18-20).

In *Anargyros v. Anargyros,* 191 Fed. 208 (Cal.), which was a proceeding for violation of a preliminary injunction, the moving papers prayed that respondents be required to show cause why they should not be attached for contempt in the doing of certain acts which were alleged to be in violation of the rights of complainant and the preliminary injunction. The papers were entitled in the

civil suit. Said court, in discussing certain parts of the prayer, said:

> "These averments, while entirely appropriate to a proceding for compensatory relief, are largely unnecessary, if not inappropriate, to one seeking the punishment of a contemnors in vindication of the authority of the court.
>
> On the other hand, if the proceeding is intended as one of a punitive character, the moving papers are wholly insufficient in matters of substance, to advise the respondents of that fact.
>
> A contempt for which one may be punished by fine or imprisonment, purely in vindication of the authority of the court and to sustain the majesty of the law, is in its nature a distinct criminal offense and must in some appropriate form be laid as such.
>
> While the nicety and precision of an indictment may not be required, the pleading or affidavit must not only specify clearly the acts which the contemnor will be called upon to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character; otherwise he is to conjecture as to whether it is a proceeding merely to mulct him in damages for the benefit of a moving party, or one to have him punished by fine or imprisonment as for a criminal act. Here, while the specific acts complained of are, I think, stated with sufficient certainty, there is nothing to clearly indicate that the complainant is seeking to have the respondents answer for anything beyond damages for its private benefit. It is alleged that the acts done were in violation of the injunction; but that was essential to either form of relief. It is asked that respondents be 'attached for contempt'; but that

demand is likewise equally appropriate to either character of pleading. Furthermore, there is an entire lack of any prayer, demand, or suggestion that respondents be punished in any manner. While such specific demand is perhaps not essential to enable the court to afford relief of a private and remedial character appropriate to the facts, it is very clearly essential in a proceeding seeking the punishment of a respondent as for a criminal contempt; and especially should this be so where there is an absence of anything else in the pleading to definitely point the nature of the judgment sought. Moreover, as suggested in the Gompers case, it is inappropriate in a criminal contempt to entitle the proceeding in a civil case; that of itself being indicative that the proceeding is merely a part of the main controversy and for a civil and remedial purpose.

A criminal contempt is no part of the main case; it is a proceeding independent and apart, in the nature of a criminal prosecution, and should have a title of its own, proper to indicate its character. As aptly said in that case in speaking of like defects:

'This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit. United States v. Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588, 593.'

> These defects, therefore, partake of the substance, and render the moving papers insufficient to properly advise the respondents that they were charged with a criminal contempt, and consequently the record affords no sufficient foundation upon which to base a judgment of a punitory nature."

Furthermore, we feel that appellant was entitled to know *whether or not she was in fact in jeopardy.* We have previously pointed out that under the authorities she was entitled to know that the matter was a *charge* and not a *suit.* (The *Gompers* case.) Surely then, when a hearing is in progress, it would not do violence to established authority to let it be clearly known to the accused whether the matter before the court is in the nature of a preliminary hearing or an actual trial. And if it be an actual trial, that the accused will be afforded a full opportunity to defend herself.

Requirements as to form and procedure are founded upon sound reason and the experience of mankind and independently of any technicality of the law, this should be so in cases such as this. None are blind to the fact that the intricacies of the bankruptcy law and the powers of the Federal District Courts are sometimes sought to be used by unscrupulous persons in bludgeoning weak but solvent industrialists into submission to their demands. That such should be is a reflection not upon the courts but upon human nature. What more powerful arm could such designing racketeers have that the charge of contempt of court, skillfully planted, and personally prosecuted, without regard to the forms of law, nor the constitutional

rights of citizens. The district attorney is an officer of the court, sworn to uphold its majesty. He may be expected to be calm and impersonal and not to rush hastily into court without thorough investigation. If, in fact, a crime has been committed, he may be trusted to proceed in an orderly manner in a way which will leave no doubt in the mind of anyone as to the character of the proceeding. The absence of the element of personal greed or vindictiveness should react favorably upon the respect at all times due the proceedings of the federal courts. Our position is that the use of the great power which the federal courts have should be so carefully safeguarded that even the appearance of evil would at all times be scrupulously avoided.

POINT II.

There Was No Jurisdiction to Impose a Large Fine in This Case When No Evidence Was Introduced Even Tending to Show Damages or Injury Suffered by Appellee.

Assignment of error No. XVIII [Tr. p. 155] covers this ground.

This fine, as heretofore pointed out, being made payable to the United States of America in a civil proceeding to which said United States was not a party, was clearly beyond the power of the court. No citation of authority is necessary to establish that a judgment in favor of a third party not a party to the suit is beyond the court's jurisdiction.

Again the record is wholly devoid of any suggestion of proof that any act of appellant had caused any damage. Certainly there is no proof that the United States had suffered damage and none can be inferred. Likewise there is no attempt to prove that appellee suffered damage. Of course, if the matter is civil, then a fine to the United States is unauthorized. As was said in *Dakota Corp. v. Slope Co.* (N. D.), 75 Fed. (2d) 585 (C. C. A. 8):

> "It is true that, in a proper case, a court has power, in a proceeding in contempt, to impose a fine upon the contemnor for the benefit of the party injured. But here we have neither disobedience of a court order nor evidence of damage to the subject-matter."

And in *Judelshon v. Black* 116 Fed. (2d) 166 (C. C. A. 2):

> "The theory of recovery in a civil contempt proceedings is to compel the payment of damages by way of a fine, and, since no damages were suffered, there should be no finding of contempt."

So, while conceding that, had a showing been made of damage actually suffered, a fine, payable to appellee, might have been rightfully imposed, it is our contention that, in the absence of any showing of damage, a fine payable to the United States, in a large sum, is wholly unsupportable in law.

POINT III.

Receiver Not Authorized to Seize Property Adversely Claimed—Burden of Proof.

A.

The argument between the receiver and appellants arose over the question of his authority to take possession of the business and assets of the "Eustace Plumbing Company."

The authority for the appointment of a receiver in bankruptcy procedings comes from the Act and is limited by the Act. The order of the court appointing him cannot be broader than the statute.

> *Boonville etc. Bank v. Blakey,* 107 Fed. 891 (C. C. A. Ind.).

Elsewhere we contend that the moving papers did not authorize an order to appoint a receiver, but irrespective of this, even assuming that this order is valid, we contend the court did not and could not justify or authorize the seizure of the property herein involved, owned by a third party and adversely held and possessed by such third party.

In *In re Kolin,* 134 Fed. (C. C. A. Ill.), 557, the court said as to a receiver:

> "Yet he is not authorized, nor can the bankruptcy court properly direct him to take possession of property held and claimed adversely by third parties." Citing, Boonville etc. Bank v. Blakey, 107 Fed. 891; Bardes v. Hawaidine Bank, 178 U. S. 524, 538.

See also:

> *In re Ward,* 104 Fed. 985;
>
> *In re Kelly,* 91 Fed. 504.

It is appellant's further contention that the said receiver Lynch was exceeding his authority in endeavoring to take possession of said property. Furthermore, we contend that if said order can be interpreted so as to authorize the seizure of such business of a third party, it is of no force or effect and in excess of the court's jurisdiction.

Our assignment of error numbered XII raises this point and reads as follows: "The court erred in finding Katie M. Eustace guilty of criminal contempt and sentencing her when the order appointing the receiver in the above matter did not direct such receiver to take possession of the property concerning which the said Katie M. Eustace is found guilty of contempt."

This order of appointment [pp. 13-15], appointed appellee receiver "of all property of whatsoever nature and wheresoever located, now owned by or in possession of said bankrupt and of all and any property of said bankrupt and in possession of any agent, servant, officer or representative of said bankrupt." It will be noticed that it did not describe any particular property or any particular premises, nor did it authorize him to take possession of the property of any third person or particularly the property of John M. Eustace. The third paragraph of said order [p. 14] provided that all persons, firms and corporations, including said bankrupt, deliver to the receiver all property of whatsoever nature and wheresoever located *"in the possession of them or any of them and owned by said bankrupt"* [pp. 13-14].

The command to this appellant and other third persons [p. 14] is to deliver to the receiver all property in their

possession and control *and owned by said bankrupt* [p. 14]. *Ownership of the property* sought to be taken was an essential matter in determining what the receiver could take possession of and what such third party was authorized to deliver over or the receiver to receive. Union of possession and ownership by the alleged bankrupt was the criterion provided for.

The court said before any witnesses were sworn at the Fourl hearing that the question involved solely depends on the ostensible ownership [p. 50], and would not allow us to show ownership and possession in the husband for some thirty years [p. 51] or the certificate of fictitious name filed and published as required by law [p. 93]. This certificate was read to receiver Lynch [p. 70] and he was advised of such certificate, and appellants both notified him of the ownership and possession of John M. Eustace.

We believe the rule applicable here is as follows:

> "Third parties having at the time of the bankruptcy possession of the tangible property or funds involved, under claim of a beneficial or adverse interest therein, cannot be obliged to surrender them, nor can third parties owing debts to the bankrupt at the time of the bankruptcy, be obliged to pay the debts, nor can such parties be obliged to submit their rights in such property, funds or debts for determination to the bankruptcy court, by summary proceedings in the bankruptcy proceedings, even on notice and hearing: Such property, funds or debts thus owed or adversely held, are to be reached only by instituting plenary suits, in which the parties may be brought into court

by due service of summons or subpoena, pleadings may be filed, issues joined and trial had, in accordance with the usual forms of procedure."

Remington on Bankruptcy, Sec. 2134;

In re Teschmacher & Mrazay, 11 A. B. R. 549, 127 Fed. 728 (D. C. Pa.);

Bardes v. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, 4 A. B. R. 163;

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 8 A. B. R. 224;

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293, 7 A. B. R. 421;

Jacquit v. Rowley, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369, 9 A. B. R. 525.

We feel that we are entitled to rely on a recent decision of this circuit as sustaining our position. We quote from *Oswald v. United States,* 71 Fed. (2d) 255 (June, 1934):

"On Sept. 9, 1933, one Marion Newman was, on an *ex parte* motion, appointed receiver for a corporation known as Southern California Kennel Club, Inc. The order appointing the receiver authorized him to take possession of all the property of said corporation. On the night of September 9, 1933, the receiver Newman, with a United States Marshal and an attorney went to the dog racing track, called the Southern California Kennel Club where dogs were being raced. The Marshal went for the purpose of serving a copy of the order appointing the receiver on an officer of said corporation. After arriving at the dog track, one of the employees at the track let

> Newman, his attorney and the Marshal in a room where approximately $8,500 in cash was lying on tables. The Marshal served George H. Oswald, president of the corporation, Southern California Kennel Club, Inc., with a copy of the order appointing Newman receiver. The defendants were informed Newman was receiver of said corporation, at which time, Newman, as receiver of said corporation, requested possession of the $8,500 and also the dog track and the equipment. Geo. H. Oswald told Newman, the receiver, that there were no assets belonging to the corporation. Thereafter the said Oswald and the other defendants 'with force and violence' expelled the said receiver from the premises."

Thereafter, criminal contempt proceedings were filed against the defendants, they were tried before the Honorable George Cosgrave, convicted and an appeal allowed.

Throughout the progress of the case the appellants insisted that the Southern California Kennel Club, Inc., owned no property that was in their possession, and demanded by appropriate motions and objections that the government indicate what property it was claimed they had refused to turn over to the receiver and what property was owned by the corporation.

The government made no proof whatever that the corporation owned the dog race track or the money in the defendants' possession. The defendants claimed that the money and property belonged to defendant Nick Oswald.

This court reversed the conviction on the ground that there was no evidence to support the conclusion that the corporation owned anything at the place where the alleged contempt occurred. The court said:

"The government did not sustain the burden of proof and the defendants affirmatively established that there was nothing in their possession which the order required to be delivered to the receiver. Even if the trial court discredited the testimony of the defendants tending to affirmatively establish their ownership of the property, there was no evidence to establish ownership of the property by the corporation, hence there was no contempt in refusing to deliver the property demanded because the order of the court accompanying the demand showed that the demand was unauthorized. * * * We must assume that the property demanded was not covered by the order, that the receiver had no right to go upon the property or to remain there against the wishes of the lawful owner and that the refusal to turn over the property and expulsion of the receiver was proper if no unnecessary force was used * * *

"The order of the court appointing the receiver directed him to take charge of all property belonging to the corporation. He had no authority to demand possession of property that did not in fact belong to the corporation. Neither did the order require the appellants to turn over property that belonged to them. If the property demanded had been identified in the order other than by its ownership, the situation would have been different." (Italics ours.)

It needs but little demonstration to show that the foregoing case is on all fours with the case at bar. In that case the receiver was appointed *ex parte* by the Honorable George Cosgrave. The same is true here. The order appointing the receiver authorized him to take possession

of ALL the property of the corporation but did not contain specific reference to ANY property. The same is true in the case at bar. The receiver there went to the place where he believed the corporation was carrying on business, secured admission through an employee, served the order and demanded possession of the business. The same was done in the case at bar. The parties served, one of whom was the president of the corporation for which a receiver had been appointed *ex parte,* claimed title, ownership and the right of possession of the business which the receiver demanded as against the corporation and receiver. The same is true in this case. The receiver in the *Oswald* case was expelled from the premises with force and violence. In our case the receiver was expelled but without force or violence.

There can be no doubt as to there being an adverse claimant in possession.

The appellant, Chas. W. Fourl, represented John M. Eustace, the adverse claimant, and was authorized to do whatever was necessary to protect his rights [p. 97]. This evidence is uncontradicted. The evidence shows [p. 99] that appellant Fourl informed the receiver of the filed certificate of fictitious name of the "Eustace Plumbing Company" in the name of John M. Eustace and that said individual had been in such business for thirty-five years. The receiver's representative at the other store read to the receiver the said certificate of fictitious name [p. 99]. The appellant Fourl at closing time said to the receiver Lynch: "Now you can't remain here, Mr. Lynch. This is the place of business of John M. Eustace and the court never authorized you or anybody else to take possession of property other than the property of the alleged bank-

rupt in the case, Katie M. Eustace" [p. 99]. The receiver said that if Fourl would place his hand on him, he (the receiver) would accompany him out. This was done, and the receiver and all parties departed [p. 100].

It was therefore evident that the property was adversely claimed by John M. Eustace and was in his possession, and that the said Katie M. Eustace made no claim of title or ownership in the property sought to be taken by the receiver and had no possession thereof. Since no particular property was described in the order other than by reference to the *ownership* by Katie M. Eustice, the receiver was not authorized to take possession of the property involved herein, claimed by John M. Eustace. The receiver was a trespasser and, as decided in the *Oswald* case, the appellant Fourl was justified in ordering the receiver from the premises.

There was no intent to defy the order of the court, but only a refusal to allow appellee to take charge of the property of John M. Eustace, which was not required under the terms of the said order.

B. Burden of Proof.

The decision of the Circuit Court in the *Oswald* case is based largely on the total failure of the government to sustain the burden of proving that the property in question did in fact belong to the "corporation."

We feel that there has been a like failure in the case at bar on the part of appellee to sustain a like burden of proof and that for that reason, among others, the conviction must be reversed because not only is there a total failure to show any ownership in Katie M. Eustace, but

the petition for the order to show cause in re contempt [p. 16] does not even allege any ownership by Katie M. Eustace of the business or even that she was in possession thereof. There is a lack of both allegation and proof. Proof of possession by the alleged bankrupt was sought to be shown by a conversation between the receiver and a workman whom the receiver found on the premises alone at the time he came to the shop. Hearsay statements of Stevenson, a workman, as to possession or ownership are not only not admissible but they are not proof of the fact itself.

While such hearsay statements of Stevenson were testified to in the *Eustace* case, over objection [p. 41], and not being evidence, the case is in the same condition as if such statements had never been made. There is no evidence in the case to support the proposition that the alleged bankrupt was in possession or owned the Eustace Plumbing Company.

The receiver said he knew nothing of the capacity in which Stevenson was acting there, or was employed there, other than what he told him [p. 67]. This made it clear that the receiver's testimony as to his conversation with Stevenson was not proof of such fact.

As to appellant Fourl, the said Stevenson never testified at all. Hence the only testimony as to this possession or ownership by any one is that of the receiver. This testimony covered only the conversation heretofore referred to with said Stevenson. This being merely hearsay, and not being admissible against appellant Fourl, there is no showing of any character whereby to bind said Fourl with any statements of Stevenson and the cause

stands as to him without a vestige of testimony as to possession or ownership by Katie M. Eustace.

In view of the court's ruling in *In re McIntosh,* 73 Fed. (2d) 908, and the *Oswald* case, heretofore referred to, that the burden of proving guilt beyond a reasonable doubt in a criminal contempt case lies with the prosecution, (see also *U. S. v. Jose,* 951, 954 C. C. A. Wash.), and this includes a criminal intent upon the part of defendants. We respectfully submit that the burden of proof was not sustained, particularly as to the criminal intent and appellants are entitled to a reversal.

POINT IV.

The Proceedings Were Fatally Defective Because the Pleadings Did Not State Jurisdictional Facts; the Order Based Thereon Is Void and Unenforcible.

We here note assignments of error numbered I and XII which read: (I) The court erred in overruling the motion of Katie M. Eustace to dismiss the petition and order to show cause in re contempt and restoration of possession [p. 140].

(IX) The court erred in finding Katie M. Eustace guilty of contempt and in adjudging her guilty of contempt on proceedings founded upon an affidavit and an order to show cause which contains an insfficiency of statement of facts to justify a proceeding in contempt.

Not only is the petition in re contempt and the order to show cause fatally defective and wanting in essential averments, but the involuntary petition itself is fatally defective. We will take up each pleading separately.

A. The Involuntary Petition Is Fatally Defective.

The involuntary petition in this cause [Tr. pp. 6-8] is fatally defective because it does not state a cause within the bankruptcy act. It does not allege insolvency when the judgments referred to in paragraphs 2 and 3 were procured. It does recite that "while insolvent," the bankrupt suffered and permitted the Oil Tool Exchange, Inc., to obtain through legal proceedings a judgment lien on real estate belonging to and standing in the name of the alleged bankrupt." Petitioner covered the words of the statute, but it is too well settled to need citation of authority that an allegation of insolvency is not an allegation of fact. The petition must allege the debts and amount of assets in order to show insolvency. Otherwise the allegation is a mere conclusion. In this case it is even worse than a mere conclusion. Moreover, it does not state against whom the judgment was recovered. As to the second act of bankruptcy [p. 8] the petition does not show that Fourl or Harris (to whom the transfers were alleged to have been made), were creditors of said alleged bankrupt, nor does it allege there was an intent to prefer such creditor or creditors over other creditors as required by the bankruptcy act. As to the third act of bankruptcy alleged [p. 8], the allegation is that the alleged bankrupt while insolvent, caused to be transferred and concealed in the name of one G. Dibetta certain real estate situated at Huntington Beach, Cal. There is an entire absence of any allegation whose real estate this was. It is not alleged it was her real estate. It might just as consistently be the real estate of some other person as real estate belonging to the alleged bankrupt. She may

for all intents and purposes have been representing some one else when said transaction occurred.

In *In re Sig. H. Roselblatt & Co.,* 193 Fed. 638 (C. C. A.), it was held that:

A general averment in an involuntary petition in bankruptcy that the alleged bankrupt within four months preceding the date of the filing of the petition committed an act of bankruptcy, in that, while insolvent, he transferred a part of this property to creditors with intent to prefer them, and transferred and concealed large sums of money and available securities, with intent to defraud his creditors, and that the concealment was a continuous one, is too vague, and the petition is properly dismissed on demurrer.

To the same effect is

In re Carasaljo Hotel Co., 8 Fed. (2d) 469;

Matter of Moscovitz, Bankrupt, A. B. R. (N. S.) 6, 163.

It thus appears that there is no act of bankruptcy alleged. The petition is fatally defective and does not warrant the granting of any relief. We have collected under the following sub-heading numerous authorities on the subject of pleading which are applicable to both subpoints.

B. The Petition Seeking Appointment of Receiver is Fatally Defective.

Both the Bankruptcy Act, subd. 3, section 2, and the cases hold that: A receiver can only be appointed when

facts are stated showing that the appointment is absolutely necessary for the preservation of the estate.

Bankruptcy Act, subd. 3, sec. 2;

Bryan v. Bernheimer, 18 U. S. 188;

Faulk v. Steiner, 165 Fed. 861;

In re Oakland Lumber Company, 174 Fed. 634.

And is limited by the act itself.

Boonville Natl. Bk. v. Blakey, 107 Fed. 891 (C. C. A. Ind.).

In *In re Hargadine-McKittrick Dry Goods Co.,* 239 Fed. 160, the court said:

> "Where the appointment of a receiver in bankruptcy is sought, it is not enough to allege the necessity for the appointment in the language of the statute, but *the moving papers must set forth the specific facts which reasonably establish such necessity.*" (Italics ours.)

In *Faulk v. Steiner,* 165 Fed. 861, the court said with respect to receivers in bankruptcy as follows:

> "The authority to make the appointment is conferred and limited by the act. There is but one ground stated for the appointment. The act authorizes the appointment of receivers 'upon the application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' *The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate,*

> *and the facts should be stated, either in the sworn petition or in accompanying affidavits showing the necessity.*" (Italics ours.)

A petition much stronger than the one at bar was considered and held to be insufficient in that case. It is to be noted that the appointment in the case at bar was on the petition alone, without any accompanying affidavit—without any proof of facts [p. 13].

Again, the Second Circuit Court of Appeals in *In re Oakland Lumber Company,* 174 Fed. 634, said:

> "The power to take from a man his property is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is absolutely necessary —after the filing of the petition and until it is dismissed or the trustee qualified—but fraud cannot be presumed * * * In no case should a remedy so far reaching in its effects be resorted to except upon clear and convincing proof * * * All these reasons combine in requiring that the power to appoint receivers should be exercised, not as a matter of course, but cautiously, circumspectly and always upon proof that the appointment is 'absolutely necessary.' The court has *jurisdiction under the statute to appoint receivers only when the papers on the application make a clear case.*" (Italics ours.)

Especially is this true when the application is without notice to the bankrupt. Under the well established rules a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way.

As said in *Faulk v. Steiner,* 165 Fed. 861 (C. C. A. Ala.), *ibid:*

> "No principle is more essential to the administration of justice, whether by referee or a judge, than that no man should be deprived of his property without notice and opportunity to make his defense. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are an exception to this principle."

The petition in that case was found defective because it did not state facts sufficient to authorize the appointment of a receiver without notice in an involuntary proceeding upon the petition alone. Allegations of the necessity, such as absconding, absence of bankrupt beyond jurisdiction, or imminent danger of irreparable injury, were held to be jurisdictional where a receiver is appointed without notice before adjudication.

The order of appointment herein [p. 13] recites it is made on *verified petition* duly filed, and it satisfactorily appearing *therefrom* that it is absolutely necessary, etc., to appoint a receiver. This, it will be noted, does not connote a finding of fact but merely recites the facts upon which the court determined the absolute necessity. The words of the act are not merely *necessity,* but *absolute* necessity. Does the petition allege such absolute necessity, as required by the act?

The necessity herein is alleged to arise for the following reasons:

(1) That said bankrupt plans and intends to dispose of and conceal a stock of plumbing supplies so as to avoid her creditors from securing the benefit of the same as

assets of the estate; (2) that she has from some time been concealing in the names of dummies *other* real and personal property [p. 11]; that the value of her business and property is about $10,000.00 [p. 11].

Are the foregoing allegations of facts?

The allegation is "that Katie M. Eustace *has for a long time past been* engaged in the plumbing business." It is not alleged that she *is now* so engaged. It is alleged "that said alleged bankrupt *has been* the manager and operator of said business." It is not alleged that she *is now* such manager and operator. It is alleged that "said bankrupt plans and intends to dispose of and conceal such stock of plumbing supplies," etc. This is clearly nothing but the conclusion of the pleader, for no person can allege with certainty what anyone plans and intends to do. No facts are alleged from which such a conclusion might be drawn. It is alleged that "said bankrupt * * * has for some time past been concealing in the names of dummies other real and personal property."

This is not a statement of fact, it is a conclusion only. Not a single transfer to any person is alleged. Moreover, it is an immaterial averment and does not show necessity, for if the alleged bankrupt has sufficient other property to pay her debts, her purpose in doing so is immaterial.

There is no allegation that she did not have sufficient property to satisfy her creditors otherwise than that so transferred. When we read the petition for the appointment of the receiver in connection with the allegations of the involuntary petition, as we must, the total failure of jurisdictional facts most strongly appears. The involuntary petition shows three claims only, as follows [p. 7]:

Oil Tool Exchange, Inc.	$6284.02
Speirs & Meadows	650.00
A. M. Kupfer	49.95

This represents a total of $6983.97 in claims. The petition on which the receiver was appointed alleged the value of the business and property to be the sum of $10,000.00 [p. 11]. Thus the petition on its face shows the alleged bankrupt solvent with an excess of assets over liabilities. This is especially pertinent in view of the lack of allegations of insolvency or the existence of other creditors.

We submit that there is nothing in the entire petition which could authorize or justify a court in exercising the most extraordinary power of appointing a receiver, especially *ex parte,* without notice.

In this case we find a creditor having a claim less than fifty dollars, on a five hundred dollar bond, taking possession of a going business with assets as the petition alleges [p. 15] of ten thousand dollars without notice to the bankrupt or any other person, and taking as we claim, a business of a third party, the bankrupt's husband, which he had conducted for some years.

Since the petition for the appointment does not show the *absolute necessity* required by the statute, and the order itself showing it was made on said petition alone, the record falls short *both in averment and proof* of showing the necessity required. Neither the petition, the order of appointment nor any other part of the record show that the appointment was absolutely necessary for the preservation of the estate, and especially without any notice.

Since both the involuntary petition and the petition for appointment of receiver are fatally defective in their jurisdictional facts, the *order of appointment is void* and of no force or effect and the appellant cannot be held in contempt of court.

C. The Order to Show Cause in Re Contempt Was Likewise Fatally Defective. [Tr. p. 20.]

The acts complained of were not done in the immediate view of the court. It was therefore a constructive contempt, if anything. Ordinarily an affidavit of facts constituting the contempt must be presented to the court, which affidavit must show on its face a case of contempt, and if it does not the court has no jurisdiction and the order of contempt is void.

Overend v. Sup. Ct., 131 Cal. 280, 284;
Frowley v. Sup. Ct., 158 Cal. 220;
Fletcher v. Dist. Ct. Appeal, 191 Cal. 711.

Such affidavit must show a criminal intent and in the absence of such allegation is fatally defective and subsequent proceedings are absolutely void.

Hutton v. Sup. Ct., 147 Cal. 156.

In this case there was no affidavit of facts or moving papers serving as such. These proceedings were instituted by a petition of the receiver seeking to recover possession of said business, for an injunction to restrain interference with his possession and to declare defendants to be in contempt. The fatal condition of this pleading has already been shown.

There was no affidavit or moving papers in this case other than an order to show cause [p. 20]. This defect is

jurisdictional. If the papers fail to contain facts constituting contempt the defect is jurisdictional.

Berger v. Sup. Ct., 175 Cal. 719, 15 A. L. R. 373;

Strain v. Superior Court, 168 Cal. 216, Ann. Case, 1915 D. 702;

Phillips Sheet, etc. Co. v. Amalgamated, etc. Workers, 208 Fed. 335.

Such defects cannot be cured by proof on the hearing.

Frowley v. Superior Court, 158 Cal. 220.

The order to show cause in re contempt against appellants while directed to Katie M. Eustace and Chas. W. Fourl [p. 20] *and service of which was shortened to one day* [p. 20] *does not show any facts whatever.* There was no order to serve the *petition* for the order [p. 16] on the respondents, nor does the record show such service [p. 16]. As a proceeding in a civil cause to require restoration of possession of the premises and an application for an order restraining interference therewith, this might be considered sufficient. But as a criminal or quasi-criminal proceeding in which it is sought to punish respondents by fine or imprisonment, another condition exists.

As a criminal proceeding the respondents are entitled to know what they will be compelled to meet. There must be both allegation and proof of the facts constituting the charge complained of.

Anargyros v. Anargyros, 191 Fed. 208, 210;

Sone v. Aluminum Castings Co., 214 Fed. 936, 131 C. C. A. 232;

Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817.

and in such form that the accused may know that the judgment sought against him is one of a punitory character,—that it is intended to punish him by fine or imprisonment.

Anargyros v. Anargyros, 191 Fed. 208.

The California cases are to the same effect:

"An affidavit on which constructive contempt proceedings are based *must show on its face* the acts constituting the contempt, since the affidavit constitutes the complaint, and, unless it states facts showing that a contempt has been committed, the court is *without jurisdiction* to proceed, and any judgment based thereon is void."

Frowley v. Superior Court, 158 Cal. 220, 110 P. 817;

Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061;

Strain v. Superior Ct., 168 Cal. 216, 142 Pac. 62; Ann Cas. 1915D 702.

"Proceedings in contempt being of a criminal nature, no intendments or presumptions are indulged

Frawley v. Superior Court, 158 Cal. 220.

These decisions are all in harmony with the decisions of this court. As said in *Beauchamp v. U. S.,* 76 Fed. (2d) 663, 668, C. C. A. 9th:

"In order that disobedience of this injunction order may constitute contempt, it is necessary that

> the order be valid. Disobedience of a void mandate, order, judgment or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt."
>
> When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt, is equally void * * *' Ex parte Fish, 113 U. S. 713, 5 S. Ct. 724, 726; 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 95 S. Ct. 77, 32 L. Ed. 405; In re Ayres, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

In *Ex Parte Clark,* 126 Cal. 235, it was held no court or judge had power to punish as a contempt the violation or disregard of an unlawful order; and, where the court had made an unlawful order requiring the secretary of a corporation defendant to produce all of its books, in the absence of any showing that they contained evidence material to the plaintiff's cause, and where the secretary as a witness for the plaintiff had testified to the contrary, an order imprisoning him for contempt for violation of such unlawful order is void, and he is entitled to be released upon habeas corpus.

In *State ex rel Thornton-Thomas Mercantile Co., et al. v. Second Judicial District Court of Silver Bow County, et al.,* 20 Mont. 284, 50 Pac. 852, an order appointing a receiver was held to be void because the complaint failed to state facts sufficient to constitute a cause of action.

The same complaint and the same order appointing a receiver came before the same court in *State ex rel Johnson v. Second Judicial Court, etc.*, 21 Mont. 155, 53 Pac. 272, 69 Am. S. R. 645, in proceedings to punish a stranger to the original proceedings for contempt for failure to obey an order of the court made in the original proceedings that the stranger turn over certain money to the receiver. The court there held:

> "Where a stranger to all parties to the original suit refused to turn over property to the receiver appointed in such suit and disobeys an order of court to turn over which the court had no authority in law to make, HE CANNOT BE GUILTY OF CONTEMPT."

See also:

State v. Burke, 163 Ill. 334, 45 N. E. 235;
People v. Weigley, 155 Ill. 491, 40 N. E. 300;
Leopold v. People, 140 Ill. 553, 30 N. E. 348;
Brown v. Moore, 61 Cal. 432;
People v. O'Neil, 47 Cal. 109;
Whitley v. Bank (Miss.), 15 South 33;
State v. Winder (Wash.), 44 Pac. 125.

If the order is void there can be no question.

In *Anderson v. Robinson,* 63 Ore. 228, 126 Pac. 988, a receiver was appointed ex parte without notice. There was no statute requiring notice but the Supreme Court held the appointment void because, when such appointment was made, *there was no proof of facts* before the

court. The court further held such defect jurisdictional. The court there said:

> *"If the court is without jurisdiction to appoint a receiver, the order is void, and may be attacked or disregarded."*

As pointed out heretofore the receivership order could not authorize the receiver to take possession of the property of third persons claiming adversely under a bona fide claim of ownership as in this case. As said in *Bardes v. Hawaiideen Bank,* 178 U. S. 524, 538:

> "The powers conferred on the courts of bankruptcy by clause 2, sec. 67, after the filing of the petition in bankruptcy in case it is necessary for the preservation of property of the bankrupt, *can hardly be considered as authorizing the forcible seizure of such property in the hands of an adverse claimant."*

We feel that it should be readily apparent that the order appointing appellee a receiver was unlawful and void. Under the above authorities the court had no jurisdiction to appoint him ex parte on the basis of an involuntary petition in bankruptcy and a petition for appointment of receiver, both of which failed to state any jurisdictional facts where the order was granted on the petition alone without any showing of facts which could justify such appointment. Since the order was unlawful and void, there was no contempt in resisting its unwarranted enforcement.

POINT V.

A. Errors in Admission of Testimony.

The first hearsay declaration we wish to direct the court's attention to occurs on page 52 of the transcript wherein the receiver Lynch testifies over objection and exception taken [Exception 4, p. 53] as to a conversation with a workman Stevenson at the place of business of the Eustace Plumbing Company, and gives the content of this testimony [pp. 52-54]. Said Lynch testified that said Stevenson was working on a grinding machine, and he asked him who was in charge, to which Stevenson replied: "I am the only one here so I guess I am in charge," and in reply to a question as to where Mrs. Eustace was, he said she usually arrived around 10 a. m. and that he said he had not seen Mr. Eustace for more than a year and in reply to a question as to who was the owner said, "well as far as I know Mrs. Eustace was."

On cross-examination said Lynch testified [p. 67]:

> "I knew nothing about the capacity in which Mr. Stevenson was acting there or was employed there other than what he told me. He was the only person there."

It is therefore, evident that this testimony was hearsay and should not have been admitted. Not only was it merely the recital of a conversation, which is not proof of the facts testified to, but the conversation not being with respect to a transaction then depending *et dum fervet opus,* and with a workman whom it was not shown was representing either appellant, was inadmissible against either party; especially against appellant Fourl. More-

over, a workman could not be presumed to make any statement or conclusion which could be binding on either appellant.

Admissions or statements of a witness not made within the scope of his employment and not made in regard to a transaction then depending *et dum fervet opus* were inadmissible.

> *Fidelity & Casualty Co. v. Haines,* 111 Fed. 337;
> *Goddard v. Frefield Mills,* 75 Fed. 818.

This evidence is extremely important and undue emphasis was placed thereon by the court. Thus, while the witness Lynch was being cross-examined by appellant Fourl's attorney upon matters he contended showed there was no basis whatever for the claim that Katie M. Eustace was in possession of the property, the court made this statement [Tr. p. 64]:

> "Now the man inside said that he was employed by her, acting under her instructions."

The man inside was of course Stevenson.

Exceptions Nos. 4 and 5 was allowed to the admission of this testimony [p. 54]. There was no showing he was an employee, or agent of appellant Fourl, or anything else. Even an employee working on a piece of machinery cannot be said to be in possession and control of the business there conducted, nor the property there situated. Otherwise every employee of every store or factory, in the absence of the real owners, might be claimed to be in possession or control of the business of the owner. Such a position is preposterous.

The conversation between the Receiver Lynch and the said Stevenson in the absence of the defendants, heretofore referred to, could not bind the defendants or either of them, and was inadmissible, and is the only evidence upon which the court found possession in defendant Katie M. Eustace. Indeed, Stevenson's testimony [pp. 40-41] was introduced in the trial of the contempt proceeding of Katie M. Eustace, which was held a week or so prior to the hearing of the order to show cause against Fourl. In fact the court [p. 64] at the outset when the first witness against said Chas. W. Fourl was being examined, made a resumè of the testimony of one Stevenson, who testified at the *previous hearing* of Katie M. Eustace to the effect that the man inside said that he was employed by said Katie M. Eustace and acting under her instructions [p. 64]. The court even stated he was making a statement of evidence developed at the *previous hearing,* at which said Chas. W. Fourl was not represented, as the court well knew [p. 65]. Exception No. IX covers this. Yet we find the order on contempt as to Chas. W. Fourl [p. 130] reciting the evidence of Stevenson, who was never sworn or testified as a witness in the contempt hearing of Chas. W. Fourl [pp. 46-120]. The court found said Katie M. Eustace [p. 130] to be in possession at the time the receiver came there although she was not there, upon said hearsay testimony and upon testimony never produced in the Fourl hearing. This recital [pp. 129-133] of these hearsay statements shows the error was material and prejudicial and affected the court in arriving at its judgment.

Again the court allowed one Geo. Dyer to relate certain conversations with one John Eustace, Jr. [pp. 86-87],

concerning contents of the books of the Eustace Plumbing Company, kept by one Griffith, whether an account was kept for John M. Eustace, over objection that the admissions or statements of an agent are not competent evidence except when made within the scope of his employment during the performance of his duty [p. 86]. Neither John Eustace, Jr., nor Griffith were employees of appellant Fourl or appellant Katie M. Eustace. No foundation was made to show this. It was hearsay and the books themselves were the best evidence. [Exception No. XVIII, p. 87.]

B. Errors in Rejection of Evidence.

This point is more fully stated by quoting assignments of error numbered XI and XIX [p. 142] reads as follows:

> "The court erred in the admission and rejection of evidence in this that the court rejected the proofs offered by Chas. W. Fourl with respect to the marital status of the alleged bankrupt and with respect to the ownership of the property concerning which these proceedings were instituted."

Assignment numbered XIX is a somewhat more detailed statement of the thought:

> "The court erred in sustaining objection to appellant's offer to prove that the plumbing business, concerning which the alleged contempt was committed, had been owned and operated by John M. Eustace, husband of Katie M. Eustace, prior to their marriage in 1904 and continuously ever since, and that

she merely assisted him in it and had never put any money in it or acquired any right in it except a community interest; that Katie M. Eustace was never a sole trader nor qualified or licensed as a Master plumber, and that the license for conducting the plumbing business at 1246 East Ninth Street was and is held by John M. Eustace."

Appellant offered to prove by various witnesses [pp. 90-92] that the defendant Katie M. Eustace is and since 1904 has been the wife of John M. Eustace, and that said John M. Eustace before and ever since his marriage owned and conducted the business known as the Eustace Plumbing Company, and that the defendant at no time had any interest in the said business; that said wife had no certificate of qualification as a master plumber, which was prerequisite to engaging in such business under the city ordinance of Los Angeles where the business was conducted; that a certificate of fictitious name had been filed by said John M. Eustace to the effect that he was doing business as the Eustace Plumbing Company; and that Katie M. Eustace had never taken any proceedings as required by sections 1811-12, C. C. P., of the state of California to enable her as a married woman to become sole trader [p. 90].

The witnesses were not examined by question because the court excused us from doing this [p. 92]. This testimony was rejected on the ground of immateriality and irrelevancy [p. 92] and this we feel was prejudicial error affecting one of the vital questions involved in this case.

The court indicated he was not interested in ownership of the property involved, only in possession [p. 92].

When the order of appointment of the receiver was made by the court, which is the measure of authority of said receiver [p. 14], it required all persons, including the bankrupt, to deliver to and turn over to such receiver all property *"in the possesion of them or any of them, and owned by said bankrupt and such bankrupt is ordered forthwith to deliver to said receiver all and any such property now in the possession of said bankrupt."* [p. 14.]

It will be noticed that *possession plus ownership* by the bankrupt was the factor determining whether the receiver was to take possession of the property. Even the bankrupt was only required to turn *such* property over to the receiver. Property the bankrupt did not own was not required to be delivered over to the receiver.

This proffered evidence tended to show who was in possession of the premises at the time of the alleged receivership. It was one of the physical facts to be considered in connection with the business. The receiver [p. 52] had testified, over objection, to conversations he had with one Stevenson, a workman, in the absence of appellants as to whether Mrs. Eustace was the owner of the business and the reply of the workman: "well, as far as I know Mrs. Eustace is the owner." [pp. 41, 53.] On cross-examination Stevenson said he did not know of his own knowledge who owned the business, and that if said receiver had asked him if John M. Eustace owned the business he would have said yes as far as he knew [p. 41].

Yet, while admitting such testimony as to ownership, over objection, when presented by the receiver, the court refused to admit evidence documentary and verbal of

ownership to overcome such statement of Stevenson. The receiver regarded these questions to Stevenson as important, for we find this statement on page 67 of the transcript: "I was inquiring for Mrs. Eustace because I wanted to find out who was in possession, in control."

Certainly the facts offered to be proved, to-wit, ownership by John M. Eustace of the business, filing of certificate of fictitious name by him as Eustace Plumbing Company, relationship of alleged bankrupt as wife of John M. Eustace, inability under law for her to engage in plumbing business because of city ordinance requiring master plumber's certificate of qualification, and her inability to engage in business by reason of not having become a sole trader under the state law, all tended to negative the hearsay declarations of Stevenson, a workman, made in the absence of appellants, and tended to negative ownership and possession in the alleged bankrupt and place it in that of John M. Eustace.

Furthermore, since under the law heretofore cited, the receiver was not and could not be authorized to or empowered to, take possession of the property of third persons in their possession and adversely claimed, it was proper to show that John M. Eustace was the owner of the business and in possession thereof, and not his wife, the alleged bankrupt.

It was admissible for another reason, for under the *Oswald* case, 71 Fed. (2d) 255, heretofore set forth in this brief, appellant was not required to deliver to the receiver property claimed by his client.

Exception No. 17 [p. 80] and Exception No. 19 [p. 93] are directed to the same question. The court would

not allow argument on the subject [p. 80] and would not allow appellant to show conduct of the business by John M. Eustace for more than thirty years [p. 90], all tending to show possession and ownership.

In view of the foregoing and the court's attitude, as pointed out in the references above, this was vital testimony, affecting the substantial merits of the case and its rejection was prejudicial and could not help but affect the decision.

We need only refer to the orders in re contempt [pp. 129-131] and [p. 129] finding appellants guilty and giving certain relief. These findings are in the nature of findings of fact and conclusions of law but are really a resumè of the evidence. On page 130 of the transcript we find a resumè of the conversation of Stevenson and the receiver, as well as the hearsay statements heretofore objected to. The court evidently based his decision thereon, as there is no other testimony even tending to support a possession or ownership by the alleged bankrupt. This order is dated and entered after the perfecting of the appeal as heretofore pointed out and entered *nunc pro tunc,* but if this is not a civil case such a finding of fact and conclusion of law has no place in the record. If a civil case, it was entered after appeal perfected, when the court's power over the case had ceased and is of no force or effect. However, it does show what the court had in mind when it made the rulings complained of. It shows clearly it was a vital factor in the decision.

Again it was prejudicial error to refuse the admission of testimony that the receiver had notice of the ownership by John M. Eustace of the business conducted under the name of Eustace Plumbing Company and that Katie

M. Eustace had no interest therein [Exception No. 8, p. 60].

An offer was made to show that one Hiram E. Casey told the receiver before said receiver went to the place of business of the Eustace Plumbing Company that the alleged bankrupt had no interest therein and that same was not in the possession of the bankrupt [p. 60].

This is covered by assignment of error No. 21 [p. 144].

The reason the court gives is as follows:

> "The Court: Mr. Tuttle, the court expresses the opinion that if a Receiver or an officer of the Court were to be guided or affected by what counsel told him as to the facts in cases he would never get anywhere. I think that is evident to anybody. That fact would mean nothing at all. The objection is sustained. The ruling has already been made, however."

We submit this was error as in connection with the other testimony as to possession and ownership excluded, it tended to show who was in possession. This being a vital question under the court's view it should have been received and its rejection was prejudicial error.

While the court may deem the rejection of any one of them was not sufficient to authorize a reversal, yet when considered in connection with the manner in which the case was conducted it indicates that the appellants did not have that fair and impartial trial to which they were entitled.

POINT VI.

The Proceedings Below Denied Appellant the Due Process of Law Guaranteed by the Constitution.

As we pointed out in our statement of facts, appellant was called as a witness against herself on the day the matter first came before the District Court. She was neither informed that the proceedings were criminal; that she was in jeopardy; nor advised of her right to refuse to incriminate herself. The whole proceeding at that stage was treated as purely civil—a means of forcing a quick turnover. Nothing appeared from the moving papers and nothing was said or done to indicate to appellant that if she handed over her key to the premises in dispute anything further would be done or required of her. The attitude of the court at that time indicated that if there was any further interference with the receiver, the court would be inclined to be severe about it (22) but certainly nothing suggested that the matter which had passed would be treated as criminal and a severe sentence imposed. So that appellant is hardly to be blamed for omitting to insist that she should not be called to testify. We are not to be understood as conceding that anything appellant testified to did in fact incriminate her—our point is rather, that it was a violation of her constitutional rights to call her as a witness without informing her of her right to refuse to testify—IF THE PROCEEDING WAS IN FACT CRIMINAL. The Supreme Court of the United States in its decision of the *Gompers* case noted this constitutional right when it said:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable

> doubt, and cannot be compelled to testify against himself." Citing Boyd v. U. S., 116 U. S. 616; United States v. Jose, 63 Fed. Rep. 951; State v. Davis, 50 W. Va. 100; King v. Ohio Ry., 7 Biss. 529; Sabin v. Fogarty, 70 Fed. Rep. 482, 483; Drekeford v. Adams, 98 Georgia 724.

The action of the trial court in allowing appellant to be called as a witness against herself was assigned as error in the assignment numbered XIX. [155.]

We are not unmindful of the authorities which hold that this constitutional guarantee against self-incrimination is a personal privilege whch may be waived, but we most strenuously contend that such waiver, under the authorities, must be voluntary and not induced by trick, device, or coercion.

How, then may it be said that there was a voluntary waiver in this case when *nothing* about the pleadings, order, or conduct of the case gave any indication that this was a criminal charge and not a civil suit? We contend that there can be no waiver except one voluntarily made on a criminal proceeding, instituted, entitled and conducted so as to make it fully apparent that the accused is in jeopardy.

In addition to the foregoing constitutional deprivation, we feel that appellant was deprived of her constitutional right to a fair trial by the manner in which the court forced the proceedings to be heard. The thought is well expressed in assignments numbered XIII and XIV.

It will be recalled from the statement of facts that the order to show cause in this matter was made returnable in ONE day [p. 20]; that service of this order was made on appellant only a short time prior to the hour fixed for

the hearing [p. 37]; that appellant asked and was denied time to plead [p. 37]; that she asked and was denied time to answer [p. 37]; that she asked and was denied an opportunity to procure witnesses to testify in her behalf [p. 38]; that she asked and was denied a court reporter to record the proceedings [p. 39].

The thought naturally presents itself: Was this summary proceedure a violation of the due process clause of the Constitution? We submit that it was.

As said in *Boyd v. Glucklich,* 116 Fed. (C. C. A. 8th) 131, 134:

> "Dispatch in judicial proceedings is commendable, but in proceedings involving the libery of a citizen, he has a right, not only to be informed of the precise claim against him, but after receiving that information, he has a right to a reasonable time to prepare his answer and his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankruptcy Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt. The Bankruptcy Act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen. Construing the proceedings before the referee as we do, we think they were too summary in their character,

> and that it was against this summary proceeding the bankrupt asked to be heard, and that there was not accorded to him, and not intended to be accorded to him, by the referee, a reasonable time to answer the trustee's application, or to be further examined or to introduce evidence after being advised of the specific claims made against him by the trustee. The referee did not advise him that he had these rights, and the record does not show that he waived them, or intended to do so."

In *In re Dingley,* 182 Mich. 44, 148 N. W. 218, the court in criminal contempt proceedings made its order to show cause returnable in seven days and over the relator's attorney's protest that this date did not give sufficient time within which to present his facts, nevertheless the matter proceeded to trial. The appellate court held that a reasonable time must be given relator within which to appear and prepare his case, and that this was too hasty. It said:

One of the earliest maxims with which the student of the law becomes familiar is that every alleged offender is entitled to his day in court before he is condemned. We quote from *Ferry v. Miltimore etc. Co.,* 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787:

> "It is a rule as old as the law, and never to be more *respected* than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Our position cannot be more strongly put than by repeating the words "Judicial usurpation and oppression." We submit they most aptly characterize the proceedings below and for said reason, if none other, the conviction and sentence must be reversed.

POINT VII.

If Appellant Did, in Fact, Commit Contempt of Court Such Contempt Was Cured by Her Action in Turning Over Her Key to the Ninth Street Place of Business.

We do not concede that appellant did commit a contempt of court. The most that all the evidence, taken together and all accepted as true, shows she did is express extreme indignation and annoyance at appellee and the attorney representing the petitioning creditors upon the one occasion when appellee tried to take possession of the place of business of the Eustace Plumbing Company. The evidence does not disclose any disrespectful remarks concerning the court or its officers as such. The language used by appellant was mild compared with the language used by the defendants in the *Oswald* case, previously cited. Outside of the language used there is nothing charged against appellant. A mere threat to interfere with a receiver is not sufficient to constitute contempt. *In re McBryde,* 99 Fed. 686. Appellee nowhere testified that appellant committed any act of violence—that she participated in his eviction—or that she obstructed him in any way, except that she locked the door after all parties were outside the premises.

We cannot concede that anything so trifeling as this under the circumstances disclosed could constitute con-

tempt. But, if it did constitute contempt—if it can truthfully be said that appellee did, by such action and such talk, interfere with the possession of the Receiver—such contempt was cured.

As appears from the clerk's minutes of that date, at the conclusion of the hearing on September 12th, *appellant turned over to appellee in open court her key to the Ninth Street place of business* [p. 22]. We quote these minutes a second time:

> "The Receiver is instructed to take possession of the property, and the court having stated that if there is any interference with the Receiver, the court will be inclined to be severe about it, Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court, and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared." [p. 22.]

Conceding, solely for the sake of argument, that appellant was the ostensible owner of the business in question; that she had the right and the duty to surrender it to appellee, and that she willfully refused to do so, thereby obstructing appellee in the performance of his duty, nevertheless, when appellant *in open court* repented her error and, by handing over the key, placed appellee in full possession, she thereby purged herself of contempt, and the subsequent sentence of a criminal nature for the past act was clearly erroneous. As was said in *Boyd v. Glucklich,* 116 Fed. 131 (C. C. A. 8th):

> "It should always be rememdered that the section does not give bankruptcy courts broader powers to punish for contempt than are possessed by other Fed-

> eral Courts. . . . The mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States Courts, *and what is legally sufficient to purge the like contempt in the other courts of the United States is sufficient to purge contempt in a court of bankruptcy.*" (Italics ours.)

The cases heretofore cited distinctly hold that in a proceeding instituted, entitled and tried as this one, an unconditional sentence cannot lawfully be imposed. The only sentence the court could have lawfully imposed at the conclusion of the hearing on September 12th, had appellant still refused to surrender possession, would have been that she stand committed to jail *until she comply with the court's order.* Under such a sentence she would have held in her hands the keys to her prison, and by compliance with the order could at any time go free. How then, may it be said, that a greater sentence may be upheld when appellant complied with the court's order *in open court?* [p. 22.] We respectfully submit that appellant purged herself of all possible charge of contempt, and that the fine imposed after the contempt had been cured was wholly improper.

Conclusion.

In view of the foregoing and the authorities cited we respectfully submit that the judgment should be reversed.

Respectfully submitted,

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